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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 **JANE DOE,**

14 **Plaintiff,**

15 **v.**

16 **CITY OF SAN MATEO,**

17 **Defendant.**

Case No. 3:07-CV-5596

**INTERVENOR JAMES MASON'S NOTICE
OF MOTION AND MOTION TO UNSEAL
THE COMPLAINT OR,
ALTERNATIVELY, MOTION TO
MODIFY THE PROTECTIVE ORDER**

18 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

19 Please take notice that on Friday, January 11, 2008 at 9:30 a.m., or as soon thereafter as the
20 matter may be heard, Intervenor James Mason, through his counsel, Harry S. Stern of RAINS,
21 LUCIA & WILKINSON LLP, will move to unseal the complaint in this action, or alternatively,
22 move to modify the protective order previously issued in this case.

23 **I**
INTRODUCTION

24 Intervenor James Mason ("Mason") requests an Order to Unseal the Complaint that is the
25 basis for the underlying litigation. The unsealing of this court record is requested as the seal was
26 inappropriately ordered, and the Plaintiff has an alternative means of protecting both her privacy
27 and reputation. Plaintiff has filed serial lawsuits based on the same event, and now subjects the
28 Defendants in both cases to possible conflicting pleadings and legal arguments, as well as the

unnecessary expense of time and resources. Access to the records of this case will ease the tasks of the Courts in both cases, and will facilitate timely and cost-effective trials for all parties.

Alternatively, Mason requests an Order to Modify the Protective Order, allowing him access to the record of this case, including Plaintiff's original Complaint, as well as the Plaintiff's First Amended Complaint. Should the court find that alternative means of protecting the Plaintiff's privacy and reputation from undesirable harm be insufficient, and concluded that, in light of the circumstances surrounding both cases, a protective order is still necessary in the present case, a modification of the existing protective order will better serve both courts' ability to administer justice and facilitate the efficient use of time and resources for all parties. Intervenor Mason learned of the instant suit while preparing for trial in state court. Plaintiff's attorney acknowledges that this suit was brought by his client based on the same incident as that which is pending in the state court suit, which was not filed under seal.

II LEGAL ANALYSIS

A. AUTHORITY OF THE DISTRICT COURT TO ISSUE, REMOVE, AND MODIFY PROTECTIVE ORDERS

1. Recognition of the Court's Authority to Issue a Protective Order

Although the protective order in this case has sealed the complaint (rather than an element of traditional discovery) from public record, the Court's authority to protect this document originates under Federal Rule of Civil Procedure 26(c). Under Rule 26(c), "the court in which the action is pending . . . may make *any* order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" Fed. R. Civ. P. 26(c) (emphasis added). "The Supreme Court has interpreted this language as conferring 'broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.'" *Phillips v. Gen. Motors*, 307 F.3d 1206, 1211 (9th Cir. 2002) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)). Intervenor Mason recognizes the court's authority to utilize a protective order in all matters of a case, including the sealing of a complaint.

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2. Recognition of the Court's Authority to Remove a Protective Order

It is well established that a court may unseal documents, as the court has supervisory power over its records and files. *See e.g., Phillips*, 307 F.3d at 1208-14; *Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994); *Wilk v. American Medical Ass'n*, 635 F.2d 1295 (7th Cir. 1980). Just as the District Court is in the best position to determine the appropriateness of a protective order in a given case, the same can be said for removing a protective order. The local rules make clear that the Court, at its own discretion, may order a document to be unsealed during the pendency of the case. *See* Civil L.R. 79-5(f). Perhaps more tellingly, the courts are not only encouraged, but *required* to construe and administer the Federal Rules in a manner "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P.

3. Intervention as the Appropriate Means to Unseal or Modify a Protective Order in the Present Case

Case law has established that in addition to acting sua sponte, a court may unseal documents on motion of any party or third party. *See e.g., Phillips*, 307 F.3d at 1208-14; *Grove Fresh Distribs.*, 24 F.3d at 893; *Wilk*, 635 F.2d at 1295. Furthermore, courts have long held that a protective order must actually state that *any* member of the public has the right to challenge the sealing of any particular document. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944-45 (7th Cir. 1999) (emphasis added). Although not originally a party to this case, intervention is the procedurally appropriate course for a third party to challenge the appropriateness of protective orders. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472-73 (9th Cir. 1992) citing *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988).

B. THE INAPPROPRIATE ISSUANCE OF A PROTECTIVE SEAL IN THE UNDERLYING LITIGATION

1. Plaintiff's Actions have Resulted in the Inability of the Protective Order in this Case to Meet the Court's Intended Purpose

Although some courts have narrowly interpreted the protections offered under Rule 26(c), more recent decisions have demonstrated the need for a more expansive understanding by issuing

1 protective orders for reasons beyond those enumerated in Rule 26(c). *See Phillips*, 307 F.3d at
2 1211-12. Despite such well-intentioned efforts on the part of the judiciary, the Plaintiff's actions
3 in this matter have rendered the protective order ineffective and powerless.

4 On November 20, 2006, the Plaintiff in this case filed suit in state court against James
5 Mason alleging Sexual Assault & Battery, Intentional Infliction of Emotional Distress, Negligent
6 Infliction of Emotional Distress, Fraud, and Defamation. A separate state action, which the
7 Plaintiff designated as related and was eventually consolidated with the Plaintiff's action against
8 Mason, was filed concurrently against the San Mateo County Sheriff's Office, and the San Mateo
9 Police Department; the original Defendants in this action. In her suit against the public entity
10 defendants, Plaintiff alleged that the defendants had failed to investigate her claims of Mason's
11 sexual assault and that they had falsely arrested and imprisoned her on the evening that she was
12 removed from Mason's home. In neither case did the Plaintiff seek a protective order, allowing
13 for the traditional public right of access without any interference on her behalf. Plaintiff
14 eventually dismissed the action against the public entity defendants, choosing instead to proceed
15 solely against Mason in state court, and then filing the complaint that is the basis for this litigation
16 under seal in federal court. Although not privileged to see the text of the complaint, Intervenor
17 James Mason believes this federal suit to be based on the same set of facts as the action originally
18 filed against him and these same Defendants in state court, absent any protective order
19 whatsoever – a fact confirmed by Plaintiff's attorney in the state court action.

20 Although the federal rules have been broadly interpreted, a judicial order simply cannot be
21 fashioned in a manner that eliminates public access to the names, allegations, and other sensitive
22 information initially asserted against the Defendants in the Plaintiff's original state actions; they
23 are forever part of the public record. Due to the Plaintiff's own action prior to filing this
24 complaint, any order protecting the Plaintiff's privacy or shielding her from embarrassment will
25 be wholly ineffective. In light of the facts of which this court is only now aware, it is indisputable
26 that the protective order allowing the complaint of this case to be filed under seal should never
27 have been issued.

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1 **2. Existence of Alternative Means to Protect the Plaintiff from Annoyance,**
 2 **Embarrassment, Oppression, or Undue Burden or Expense**

3 Although Rule 10 of the Federal Rules of Civil Procedure stipulates that all parties' names
 4 must be included in a civil action's title, plaintiffs in a variety of civil cases have drawn on their
 5 ability to sue anonymously in order to avoid harassment, embarrassment, and other undesirable
 6 consequences. As evidenced by the caption of this case, Plaintiff has similarly utilized her ability
 7 to sue anonymously. Plaintiff has been permitted to proceed using a "Doe" appellation,
 8 concealing her identify from the public, and providing her with the same protections sought under
 9 Rule 26(c). In proceeding under the "Doe" appellation, Plaintiff has eliminated the need for the
 10 protective order already issued in this case, leaving the public, and Intervenor Mason in
 11 particular, with only an unnecessary obstacle to the common law right of access.

12 **C. MODIFICATION OF THE EXISTING PROTECTIVE ORDER WILL BETTER SERVE THE**
 13 **INTERESTS OF JUSTICE, AVOID DUPLICATIVE EFFORTS, FACILITATE THE PARTIES'**
 14 **EFFICIENT USE OF TIME AND RESOURCES, AND PROMOTE JUDICIAL ECONOMY**

15 It is well established that the Court strongly favors access to the materials of one case to
 16 meet the needs of parties engaged in collateral litigation. *See Phillips*, 307 F.3d at 1231 (citing
 17 *Beckman Indus., Inc.*, 966 F.2d at 475). "Allowing the fruits of one litigation to facilitate
 18 preparation in other cases advances the interests of judicial economy by avoiding the wasteful
 19 duplication of discovery." *Id.* Where the Court is able to fashion a modification of the protective
 20 order that is consistent with the affected party's legitimate interests, the collateral litigant's
 21 request to the issuing court should generally be granted. *See Phillips*, 307 F.3d at 1232 (citing
 22 *Beckman Indus., Inc.*, 966 F.2d at 475; *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265-66 (9th
 23 Cir. 1964)). Courts have held that the collateral litigant must only demonstrate the mere
 24 relevance of the protected discovery to the collateral proceedings and its general discoverability
 25 therein, with such relevance hinging on "the degree of overlap in facts, parties, and issues
 26 between the suit covered by the protective order and the collateral proceedings.'" *See Phillips*,
 27 307 F.3d at 1232 (quoting Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of*
 28 *Confidentiality in the Pursuit of Settlement*. 74 Notre Dame L. Rev. 283, 366-67 (1999)).

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1 With respect to this court's concern for its own time and resources, case law suggests that
2 once satisfied that the collateral litigation is sufficiently relevant to allow modification to avoid
3 duplicative discovery efforts, its obligation to resolve disputes over the ultimate discoverability of
4 the materials covered by the protective order ends, as this is solely the obligation of the collateral
5 court. *See Phillips*, 307 F.3d at 1232 (citing *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d
6 1424, 1428 (10th Cir. 1990); *Superior Oil Co. v. Am. Petrofina Co.*, 785 F.2d 130, 130 (5th Cir.
7 1986)).

8 As previously discussed, on November 20, 2006, the Plaintiff in this case filed suit in state
9 court against the Intervenor, James Mason. In a separate but concurrently filed state action
10 against the San Mateo County Sheriff's Office, and the San Mateo Police Department (two of the
11 original Defendants in this action), Plaintiff alleged that the Defendants had failed to investigate
12 her claims of Mason's sexual assault, and that they had falsely arrested and imprisoned her on the
13 evening that she was removed from Mason's home. The Plaintiff herself designated these two
14 actions as being related, and they were eventually consolidated. Although Plaintiff eventually
15 dismissed the action against the public entity defendants, choosing instead to proceed solely
16 against Mason in state court, the complaint that is the basis for this litigation is based on the same
17 set of facts as the original state actions. Worthy of some notice is the fact that, in addition to the
18 original public entities she had sued in state court, Plaintiff has also identified individual police
19 officers of the San Mateo Police Department, and the San Jose Police Department (by whom
20 Mason is employed) as Defendants in this action. Furthermore, at this time, in her state action
21 against Mason, Plaintiff has noticed the deposition of the two individual officers that are named
22 in this complaint, demonstrating the relationship between the two cases. Perhaps of even greater
23 concern, Plaintiff now subjects the Defendants in both cases to possible conflicting pleadings and
24 legal arguments, as well as the unnecessary expense of time and resources. Access to the records
25 of this case will ease the tasks of the courts in both cases, and will facilitate timely and cost-
26 effective trials for all parties as the facts, parties, and issues between the suits are identical.

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**III
CONCLUSION**

For the reasons set forth above, cause having been established, Mason respectfully requests that this Court grant the Motion to Unseal the Complaint. Alternatively, Mason requests that this Court grant the Motion to Modify the Protective Order, allowing him to access to the records of this case.

Dated: December 4, 2007

Respectfully Submitted,

RAINS, LUCIA & WILKINSON LLP

/s/

By: Harry S. Stern
Attorneys for Intervenor JAMES MASON